Filed 2/11/04 P. v. Aunchman CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER LAWRENCE AUNCHMAN, Defendant and Appellant.	B167847 (Los Angeles County Super. Ct. No. KA058268)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

John Doyle, under appointment by the Court of Appeal for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jeffrey B. Kahan and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Christopher Lawrence Aunchman of driving under the influence causing injury and with a blood alcohol level over 0.08 percent causing injury (counts 1 and 2), and found he proximately caused bodily injury to two separate victims. (Veh. Code, §§ 23153, subds. (a) and (b); 23558.) The trial court sentenced him to an aggregate term of four years in state prison. On appeal from the judgment, Aunchman contends the court erred by denying probation and by imposing the upper prison term. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The evidence adduced at trial established that around 9:50 p.m. on August 20, 2002, appellant was driving three friends to a party on Arrow Highway in the city of La Verne. He had a blood alcohol level of 0.22 percent. Accelerating the car up to 75 miles per hour, appellant ignored his friends repeated pleas to slow down, and instead increased his speed up to 90 miles per hour. Appellant said to his friends: "I don't care," and, "Do you guys want to die?" Appellant jerked the steering wheel to the right and lost control of the car. It struck the curb and rolled over several times before finally hitting a light pole and coming to rest upside down. As a result of the collision, one of the friends, a female passenger, was comatose. She is the mother of a then two-year-old daughter. Another friend suffered broken ribs and deep lacerations.

Shortly after the verdicts, the trial court expressed concern with several factors surrounding the collision, including appellant's high blood alcohol level, his reckless driving and disregard for his friends' warnings, and the severity of their injuries. The court ordered the preparation of a new probation report prior to sentencing.

Before sentencing, the court read and considered the new probation report as well as letters sent on appellant's behalf. At sentencing, the court indicated it was disinclined to follow the probation officer's recommendation that appellant be granted probation.

According to the probation report, appellant was 24 years old and had been abusing alcohol since the age of 14 years. He completed the 11th grade, was currently employed at a restaurant, unmarried and childless. In January 1998, appellant was convicted of petty theft for which he served one day in county jail and was placed on

three years of summary probation. Nine months later, he was convicted of misdemeanor vandalism. The court ordered three years probation and work in lieu of 30 days in county jail. On June 25, 2000, appellant was arrested for disorderly conduct and intoxication, which resulted in no court action. He was on probation when he committed all but his first offense.

The probation officer found one factor in aggravation, "the crime involves great bodily injury and other acts disclosing a high degree of callousness," and no factors in mitigation.

The court listened to defense counsel's comments in mitigation. Counsel argued his client was young and amenable to alcohol treatment. He reminded the court appellant had already been in custody in this case for nearly one year. He urged the court to impose a suspended state prison sentence, grant appellant formal probation and order restitution for the female passenger. Counsel also asked the court to review a police videotape made soon after the collision, in which appellant showed remorse for causing the collision and injuring his friends. Appellant's father testified and described his son's remorse and need for rehabilitation as opposed to incarceration.

The prosecutor filed a sentencing memorandum arguing that under all but one of the factors listed in rule 4.414 of the California Rules of Court, appellant was not eligible for probation. She informed the court that one of appellant's friends told police he had been a passenger with appellant on 15 to 20 occasions when appellant drove under the influence of alcohol. The prosecutor noted appellant's record of alcohol-related arrests and added that in August 2001, police cited appellant for driving with an open container of alcohol in his car.

The court also heard evidence in the form of witnesses' testimony and a letter from a police officer as to the severity of the injuries sustained by the female passenger. She suffered permanent brain damage and, at the age of 19, would require life-long medical care. The grandmother would have to raise the now three-year old daughter.

The trial court read appellant's previously submitted letter and accepted appellant's representation of remorse. The court stated that it had "strongly consider[ed]" the disposition defense counsel had proposed.

After counsel argued, the trial court sentenced appellant to the upper term of three years for driving under the influence causing injury, enhanced by one year for causing bodily injury to two separate victims. The court stayed sentencing on count 2 pursuant to Penal Code section 654. The court agreed to recommend incarceration at Donovan State Prison or fire camp.

The court supported its denial of probation and imposition of the upper term with the following factors in aggravation: Appellant's 0.22 blood alcohol level, indicating a history of alcohol abuse; the circumstances of the collision, his prior alcohol-related offenses, and his previous driving while intoxicated on numerous occasions. The court commented that formal probation with alcohol treatment and restitution might be appropriate in a case involving lower driving speeds and a lower blood alcohol level, where the defendant had little or no warning of a possible collision. However, those factors were inapplicable in this case and the court was compelled to consider the "down stream dangers to society" posed by appellant. The court found only appellant's age and his relationships with his family and church as mitigating factors. However, his family and church support were of "marginal significance," because they failed to hinder appellant's alcohol abuse.

DISCUSSION

Appellant contends the trial court erred in sentencing him. He argues the court wrongly denied him probation because it misperceived the probation department's ability to monitor him on formal probation, misunderstood the consequences of sentencing appellant to state prison, and misconstrued Vehicle Code section 23558 as favoring state prison commitment. Appellant complains the court imposed the upper term without adequate notice and improperly failed to consider his "alcoholism" as a factor in mitigation.

1. Appellant has waived his claims of sentencing error.

The trial court clearly articulated its discretionary sentencing choices and defense counsel had ample opportunity to speak but, nevertheless, failed to interpose an objection. As a result, appellant's claims of sentencing error are waived.[1] (*People v. Scott* (1994) 9 Cal.4th 331, 352-353, 356 [waiver doctrine applies to claims concerning trial court's failure to articulate its discretionary sentencing choices, even in cases where the court failed to state reasons for such choices because defects in statement of reasons are easily prevented and corrected if called to the court's attention]; see also *People v. Gonzalez* (2003) 31 Cal.4th 745, 752.)

We reject appellant's alternative claim that defense counsel was ineffective by failing to object to the trial court's denial of probation and imposition of the upper term. On this record, appellant cannot affirmatively show his defense counsel was constitutionally inadequate. It is not reasonably probable the trial court would have imposed a lesser term or granted probation, had defense counsel objected on the grounds appellant now raises. (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 368-371; *Strickland v. Washington* (1984) 466 U.S. 668, 690-696; *People v. Lucas* (1996) 12 Cal.4th 415, 436.)

2. Appellant was not improperly denied formal probation.

"'A denial or a grant of probation generally rests within the broad discretion of the trial court and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner.' [Citation.] A court abuses its discretion 'whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.] We will not interfere with the trial court's exercise of discretion 'when it has considered all facts bearing on the offense and the defendant to be sentenced.' [Citation.]" (*People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.)

---

[1] Contrary to appellant's claim, defense counsel was given ample opportunity to present his argument against an aggravated sentence. Following imposition of sentence, the court asked counsel individually: "Have we overlooked anything?" In response, defense counsel clarified the terms of the sentence.

Here, we find no abuse of discretion. Appellant's claims of error are not supported by the record. The trial court considered the probation report, arguments of counsel, testimony of witnesses, and several letters, including appellant's. The court's remarks make clear it seriously contemplated defense counsel's proposal that appellant receive formal probation and alcohol treatment. The court gave a well-reasoned and considered explanation for its decision to deny probation. Given appellant's lengthy history of alcohol abuse, demonstrated inability to refrain from driving while intoxicated, and failure to seek alcohol treatment on his own, we would be hard pressed to conclude the trial court's decision was arbitrary or capricious.[2]

3. Imposition of the upper term was not arbitrary or capricious.

A trial court is vested with wide discretion in sentencing. (*People v. Scott, supra,* 9 Cal.4th 331, 349.) A trial court's sentence is to be upheld absent a clear showing of abuse of discretion. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) "'[T]he term judicial discretion 'implies the absence of arbitrary determination, capricious disposition, or whimsical thinking. (Citation.) "When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion."'" (*People v. Sword* (1994) 29 Cal.App.4th 614, 626.) Only one factor in aggravation need be named in order to justify imposing the upper term, and the balancing is not a quantitative exercise, but a qualitative one. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Castaneda* (1999) 75 Cal.App.4th 611, 615; *People v. Oberreuter* (1988) 204 Cal.App.3d 884, 887.)

The trial court properly relied on two aggravating factors justifying imposition of the upper term: (1) Appellant's danger to society by his pattern of uncontrolled drinking

---

[2] Appellant points to the probation report as recommending that he receive probation. However, the trial court is not bound by the probation report (*People v. Downey, supra,* 82 Cal.App.4th at p. 910), but "may in its discretion reject the report's recommendations in whole or in part." (*People v. Levingston* (1982) 136 Cal.App.3d 724, 729, fn. 5.)

and driving while intoxicated, and (2) his conduct while committing the instant offenses, which disclosed a high degree of callousness. (Cal. Rules of Court, rules 4.421(a)(1), (b)(1).) Additionally, appellant cannot dispute that his prior performance on probation was unsatisfactory, and his alcohol related offenses are increasing in frequency and severity. (See Cal. Rules of Court, rule 4.421 (b) (2), (4).) Inasmuch as there was only one significant mitigating factor, appellant's relative youth, the court did not abuse its discretion by imposing the upper term sentence. (*Id.* rule 4.421(b).) Appellant was properly sentenced.

4. Consideration of appellant's "alcoholism" as a mitigating factor.

Finally, appellant does not challenge the sufficiency of the evidence to support the factors in mitigation upon which the court relied. Instead, citing *People v. Simpson* (1979) 90 Cal.App.3d 919, he contends the court abused its discretion by failing to take into account his alcoholism as a mitigating factor. We disagree.

Some appellate courts have interpreted *Simpson* as obligating the trial court to weigh alcoholism in the defendant's favor as a mitigating factor at sentencing. (See *People v. Rey*es (1987) 195 Cal.App.3d 957, 963.) Other courts have criticized or declined to follow this interpretation. (See *People v. Reyes, supra,* 195 Cal.App.3d at p. 963; *People v. Regalado* (1980) 108 Cal.App.3d 531; 538-539; *People v. Lambeth* (1980) 112 Cal.App.3d 495, 500; *People v. Bejarano* (1981) 114 Cal.App.3d 693, 706-708; *People v. Reid* (1982) 133 Cal.App.3d 354, 370-371.) The better line of authority holds the trial court may but is not required to consider a defendant's alcoholism. (*People v. Jordan* (1986) 42 Cal.3d 308, 316; *People v. Reyes, supra*, 195 Cal.App.3d at pp. 960-961.) Addiction to alcohol or drugs is not mitigating where, as here, the defendant has a long-standing problem and has been unwilling to pursue treatment. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511; *People v. Reyes, supra,* (1987) 195 Cal.App.3d 957, 963-964.) Moreover, it is a factor that weighs against a grant of probation when it impairs the defendant's ability to remain law abiding and comply with

the terms of probation. (See *People v. Geddes* (1991) 1 Cal.App.4th 448, 457.) The trial court's rejection of appellant's alcoholism as a mitigating factor was not an abuse of discretion. Appellant's sentence was proper.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WOODS, J.

We concur:

JOHNSON, Acting P. J.

ZELON, J.